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California UPDATE

EMPLOYMENT LAW

SECOND QUARTER 2009

Discrimination Charge Filings Spike

California's Department of Fair Employment and Housing (DFEH) has just released statistics concerning claims filed in 2008. Employment discrimination filings rose more than 14 percent over 2007, to 18,750 – their highest level since 2002. The most precipitous increase involved claims of age discrimination. Complaints alleging age discrimination rose 21 percent from the prior year and represented more than 10 percent of all employment claims filed.

DFEH claims alleging certain other prohibited bases rose at rates near or below the overall increase in the number of complaints. For example, compared to 2007, sex discrimination claims (including claims of sexual harassment and sexual orientation discrimination) and claims of discrimination based on race/color each rose approximately 13 percent. Retaliation claims rose 11 percent and physical disability claims rose 7.5 percent.

That physical disability claims are rising at a slower rate than the overall number of complaints is somewhat surprising. We expect those numbers to rise more rapidly in 2009, given court decisions expanding employers' obligations to find accommodations for disabled employees. But the most striking numbers are those for age discrimination claims. These numbers reinforce a perception that the economic downturn is having a disproportionate impact on older workers.

Likewise, the EEOC reports that workplace discrimination charge filings are up 15 percent from 2007. There were 95,402 charges filed in 2008 compared with 82,792 charges filed in 2007. Retaliation and age-based charges have increased the most. Several reasons are cited for the increase - increased diversity and shifts in the labor force, heightened awareness of the law and the economic climate. It is also worth noting that the EEOC website makes it easier for employees to file charges with the initial intake questionnaire online.

The increase in charges will result in more right-to-sue letters being issued and, ultimately, more lawsuits being filed. As businesses continue to trim their ranks to adjust to the economic recession, expect further increases in DFEH and EEOC charges in 2009. Employers are advised to manage layoffs and terminations with open communication and consistent decision-making to avoid any appearance of discrimination. ◆

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A More Rigorous Standard for Approving Wage and Hour Class Action Settlements

A court of appeal's recent rejection of a court-approved settlement will make it more difficult to settle wage and hour class actions in early mediation, when only limited discovery has been completed. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th (2008), involved a class action lawsuit filed on behalf of approximately 18,000 Foot Locker employees. During discovery, the plaintiff served special interrogatories on Foot Locker, none of which addressed the meal period claims or any of the other wage claims that were first brought in the amended complaint. No subsequent discovery demands were submitted and plaintiffs took no depositions. The parties subsequently engaged in a successful mediation, and the trial court approved the settlement, concluding that the settlement was reached at arm's length, that the attorneys and mediator were experienced, that the parties had exchanged sufficient data during the mediation, and that only a few members of the class had objected. The trial court also emphasized that Evidence Code § 1119, which provides for confidentiality in mediation, prevented it from reviewing the information exchanged during the mediation.

The court of appeal vacated the trial court's approval of the settlement. Significantly, the appellate court rejected the trial court's conclusion that it could not review data relating to class counsel's evaluation of the settlement because the information was protected by Evidence Code § 1119. The appellate court determined that the trial court had an obligation to ensure that the settlement terms were fair, adequate and reasonable, and that any non-privileged communications exchanged during the mediation should have been disclosed to and reviewed by the trial court. ◆

California Revises Alternative Workweek Law

On February 20, 2009, the Governor signed a bill of amendments to Labor Code § 511, which authorize alternative workweek exemptions to overtime rules. As before, the law permits employers to propose and employees to adopt a regularly scheduled alternative workweek up to 10 hours per day within a 40-hour workweek without overtime liability for the employer. Such a proposal must be adopted by a secret-ballot election with two-thirds of the affected employees voting in favor of the change in schedule.

The amendments to § 511 state that the proposal may be either a single schedule that all workers would follow or a menu of work schedule options from which each employee in the unit may choose. The menu may include a regular schedule of five, eight-hour days, commonly known as the 5/8 week. Employees are now permitted to move from one schedule option to another, where a menu is offered, with the consent of their employer. The voting "work unit" is defined as a department, division, job class, shift or location, or subdivision thereof.

Employees may now vote to work alternating 5/8 and 4/10 workweeks, with the employer's consent. A 4/10 workweek consists of four, 10-hour work days. Certain health care workers can adopt a workweek with up to three 12-hour days.

If an employee in an affected unit is unable to work the alternative workweek adopted by vote, the employer must make a reasonable effort to find a work schedule not to exceed eight hours per day. Employers are also required to explore reasonable accommodation of religious beliefs or observances of an affected employee that conflict with an adopted alternative workweek schedule.

As always, employees receive overtime for any hours in excess of the adopted alternative workweek schedule and for any hours over 40 in one workweek. An employer may not reduce an employee's regular rate of pay as a result of a change in alternative workweek status. Employers must still report results of any election held under § 511 to the state within 30 days.

We expect that the Division of Labor Standards Enforcement will revise its procedures manual and the Wage Orders will be amended by the Industrial Welfare Commission. If you have any questions regarding this law, please contact your California Fox Rothschild LLP attorney. ◆

FMLA Regulations Create New Military-Related Leave

Employers in California often pay little attention to the federal Family Medical Leave Act (FMLA) on the assumption that compliance with the California Family Rights Act (CFRA) will satisfy their obligations under federal law. While the CFRA is often more generous to employees than the FMLA, recent updates to the federal law have given employees additional federal rights not covered by California law. One of the most significant updates involves leave available to family members of those in the military. Employers should familiarize themselves with these new rules, especially in light of our continued involvement overseas and possible redeployments into Afghanistan.

Employees eligible under the FMLA can now take 12 weeks of leave for "any qualifying exigency" that results from a spouse, son, daughter or parent being on active military duty, or being notified of an impending call to active duty status. This provision is limited to family members of those who are in the Guard or Reserve or are retired from the armed services. A "qualifying exigency" includes a wide range of activities such as attending a military ceremony, participating in a parent-teacher conference in place of a service member, spending time with a service member on leave, addressing financial or legal matters of a service member on duty, and counseling for issues that arise from a family member's service. The definition's expanse is reinforced by a "catch all" provision for other related activities not enumerated in the statute. Leave for a qualifying exigency will not exhaust CFRA leave, although it may run concurrent with time off under California's Military Spouse Leave law, which provides up to 10 days off while a military spouse is on leave.

In addition, 26 weeks of leave must be granted to a parent, spouse, child, or the next of kin of an injured or ill service member to provide for their care. CFRA leave may run concurrently with this time off, if the eligibility requirements are met. Of course, even after such CFRA leave is completely exhausted, the employee will still have another 14 weeks of leave under this section of the FMLA.

Employers are encouraged to make sure that all handbooks and leave policies are updated to comply with the new laws. ◆

New I-9 Forms

A new Form I-9 (revised February 2, 2009) became effective April 3, 2009, and is required for all new hires. Further use of the previous Form I-9 is unlawful and may subject employers to penalties. The new Form I-9 contains a new List of Acceptable Documents and makes several procedural changes. The Department of Homeland Security has updated its handbook and instructions for employers regarding Form I-9 and the process. Employers are encouraged to review all new guidelines and implement changes immediately. ◆

Unemployment Insurance Benefits Extended!

Governor Schwarzenegger recently signed legislation to extend unemployment insurance benefits. Up to 20 additional weeks are available for eligible unemployed workers. These additional benefits will be paid by federal economic stimulus funds through the end of the year.

CHANGES TO COBRA NOTICES

The recently signed American Recovery and Reinvestment Act of 2009 makes significant changes to COBRA. These changes have resulted in revised notifications and new financial obligations for employers. Employees who have been involuntarily terminated since September 1, 2008, may now extend their employer health coverage for up to nine months. Qualified beneficiaries will be required to pay only 35 percent of the required continuation premium, while the employer will be required to pay the remaining 65 percent, subsidized by the government. The United States Department of Labor has issued four model notices for employers and plan sponsors to use in conjunction with administering this new subsidy, which are available online at the DOL website. Each notice must be specifically customized to provide accurate information for the employer or plan issuing the notice. Most importantly, employers have only until **April 18, 2009**, to identify and provide the applicable notices to all eligible qualified beneficiaries under the health care plan. ◆

No Punitive Damages for Labor Code Violations

An appellate court recently held for the first time that punitive damages are generally unavailable as part of a claim for meal break, rest break or overtime claims based upon Labor Code violations. The decision was based on the "new right-exclusive remedy" doctrine, which holds that, where a statute creates a new right that did not exist in the common law, the expressed statutory remedy is exclusive. The Court determined that the Labor Code sections regarding pay stubs and minimum wages, and the regulations concerning meal and rest breaks, created new rights that did not exist in the common law, and therefore the remedies provided in the Labor Code are exclusive. The California Supreme Court declined to review the decision on March 18, 2009. Consequently, the appellate decision is citable and precedent-setting. This is good news for employers who face the seemingly endless threat of class action lawsuits and the accompanying damages for such claims. The case is *Brewer v. Premier Golf Properties, LP* (2008)168 Cal.App.4th 1243 (Fourth Appellate District, Division One).

The *Brewer* case comes after a jury in Alameda County awarded over $100 million in punitive damages against Wal-Mart for various violations of the wage and hour provisions of the Labor Code. The Wal-Mart case, called *Savaglio v. Wal-Mart Stores, Inc.*, Case No. A116458, is currently on appeal before the First Appellate District Court. An appellate decision in *Savaglio* presents the possibility of a split among appellate courts on the punitive damage issue. It will be some time before there is a decision in *Savaglio*, however, because the appeal in that case is currently stayed pending a decision in *Brinker v. Superior Court (Hohnbaum)*, the highly anticipated case concerning the proper interpretation of the Labor Code and California regulations governing an employer's duty to provide meal and rest breaks to non-exempt employees. ◆

UPDATE: *Sullivan v. Oracle Corp!*

We recently published an article discussing the Ninth Circuit case of *Sullivan v. Oracle Corporation*, which held that out-of-state employees sent to work on assignments in the state of California may be governed by the provisions of the California Labor Code. Since the publication of our last newsletter, that case is no longer good law. The Ninth Circuit has withdrawn its opinion and certified the issue to the California Supreme Court – in effect asking the state court to weigh in on the issue. We'll be tracking the case and include any further developments in a future newsletter.

San Francisco Health Care Ordinance: Mandatory Reporting Requirement

All employers covered by the San Francisco Health Care Ordinance must complete and return the Annual Reporting Form to the San Francisco Office of Labor Standards Enforcement (OLSE) by **April 30, 2009**. Forms are to be mailed to employers by the OLSE and are also available online. Covered employers include for-profit businesses employing 20 or more persons that are required to obtain a valid San Francisco business registration certificate from the San Francisco Tax Collector's office, and nonprofit businesses employing 50 or more persons. Covered employers need not be physically located within San Francisco, as long as they have employees doing business in San Francisco. And for purposes of determining employer size, all persons performing work for the employer must be counted, regardless of whether they work in San Francisco.

As a reminder, the Ordinance requires covered employers to spend a minimum amount of money on health care for employees covered by the ordinance. This year the health care expenditure rate increased to $1.23 per hour for employers with 20 to 99 employees, and $1.85 per hour for employers with 100 or more employees. The expenditure rate will increase again in 2010. It has been over two years since the Golden Gate Restaurant Association challenged this spending requirement of the Ordinance as being preempted by the Employee Retirement Income Security Act (ERISA). The Golden Gate Restaurant Association has until this June to file an appeal to the United States Supreme Court. The U.S. Supreme Court recently denied the Association's emergency application to prevent San Francisco from continuing to implement the spending requirement while the case is on appeal. ◆

TIP-SHARING POLICIES UPHELD

A purported class of restaurant servers recently lost a lawsuit alleging that a restaurant tip-pooling policy violated the California Labor Code and unfair business practice laws. The tip-pooling policy at issue required servers to share their tips with kitchen staff, bartenders and other employees that did not directly server customers. The case is *Brad Ethridge v. Reins International California Inc.*, Second Appellate District case number B205005.

The California appellate court affirmed the dismissal of this case on the grounds

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Reading Employees Their Rights

Everyone who watches police shows knows that people being arrested must be informed of their rights. But what rights do employees have when they are interviewed by attorneys representing their employer? A federal judge in Los Angeles this month took harsh steps when lawyers failed to explain clearly to an executive that they did not represent him individually.

In that case, the semiconductor company Broadcom hired Irell & Manella LLP, a Los Angeles law firm, to investigate whether former CFO William Ruehle illegally granted stock options. Statements obtained in the investigation were provided to the government, which filed criminal charges against Ruehle. The lawyers conducting the investigation for the company said they informed Ruehle that information he provided could be disclosed to the government. But Ruehle denied being so informed. He said he understood that the lawyers were representing him, too, and that his discussions with them were privileged. Supporting his belief was the fact that the same firm did represent both Ruehle and Broadcom in other matters.

U.S. District Court Judge Cormac Carney ruled that Ruehle had a legitimate expectation that what he said to the lawyers would be privileged and confidential. Judge Carney therefore threw out portions of the prosecution's case against Ruehle that were based on statements he made to the attorneys. He also referred the attorneys to the state bar for disciplinary action.

Used correctly, investigations by outside counsel can be a valuable tool for uncovering facts and demonstrating a company's commitment to compliance. But this decision highlights the problems that can arise unless lawyers pay careful attention to the privilege and conflict of interest principles that arise when interviewing company employees. ◆

TIP-SHARING POLICIES UPHELD

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that the Labor Code did not prohibit such a tip-sharing policy as long as the tips were not shared with management. The appellate court reviewed the history of the relevant Labor Code sections, as well as prior case law, which held that tips belong to all employees who participated in service, not just the wait staff. The court explained that patrons tip based on a multitude of factors including food presentation and special food requests, things which are not related to table service. The court also reasoned that a tip-sharing policy is supported by "common sense and fairness, and protects the public, the employees and the restaurant employer."

This case is a win for employers and employees alike. By allowing a portion of tips to be shared with non-wait staff, the court helps to ensure that all employees are fully compensated for their work. ◆

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